

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DRUCE DeWAYNE WALKER,

Defendant-Appellant.

UNPUBLISHED

August 13, 1999

No. 209843

Kent Circuit Court

LC No. 93 64080 FH

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon in a vehicle, MCL 750.227; MSA 28.424. Defendant pleaded guilty to a third-felony offense charge, MCL 769.11; MSA 28.1083, but subsequently moved to withdraw his guilty plea. The trial court denied defendant's motion and sentenced defendant to 4 ½ to ten years in prison. Defendant appeals as of right. We affirm.

This case arises out of an incident in which defendant confronted two acquaintances, David and Rhonda Garmon, in their car and threatened them at gunpoint in an effort to collect money owed defendant. This confrontation occurred in the area of Madison and Franklin streets in the city of Grand Rapids. Some time later the same evening, the Garmons reported the incident to the police. Police officers responding to the Garmons' complaint located defendant driving a car and attempted to stop him. After a brief car chase, defendant fled the vehicle and was apprehended on foot. The police found a .38-caliber pistol near the car. The police apprehended defendant and found the gun in the area of 22 Brown Street in Grand Rapids. Defendant was charged with two counts of felonious assault, MCL 750.82; MSA 28.277, and one count of carrying a concealed weapon in a vehicle, MCL 750.227; MSA 28.424. The felonious assault charges were later dismissed when the Garmons failed to appear to testify at defendant's preliminary exam.

On appeal, defendant first argues the trial court erred when it permitted the Garmons to testify about the alleged felonious assault over defendant's objection. We review the trial court's decision to admit the evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Defendant claims the Garmons' testimony should have been excluded under MRE 404(b). We disagree. Defendant's claim is analyzed under the familiar four-part standard clarified in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). First, the evidence must be offered for a proper purpose, i.e. it must be relevant to a noncharacter theory. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998). Second, the evidence must be relevant under MRE 402 as enforced through MRE 104(b). In other words, the evidence must be "material," in that it is logically relevant to an issue or fact of consequence at trial, and have sufficient probative force, any tendency to prove an issue or fact of consequence at trial. *Id.* Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id.* Finally, the *VanderVliet* standard authorizes the trial court to give a limiting instruction to the jury upon request. *Id.*

The Garmons' testimony was offered to prove that defendant knowingly possessed a gun, an element of the offense with which defendant was charged, carrying a concealed weapon. The testimony was also admissible to refute defendant's denial of any knowledge of the gun. Accordingly, the first two prongs of the *VanderVliet* standard were certainly satisfied in this case. Moreover, we find the high probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant. It is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. *People v Scholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). "The more jurors [know] about the full transaction, the better equipped they [are] to perform their sworn duty." *Id.* at 742. The testimony in this case was all part of the same event from which defendant was charged. There was no undue emphasis or focus on the evidence, which was merely descriptive. Finally, the trial court twice provided limiting instructions to the jury on the limited use of the evidence. We find the trial court did not abuse its discretion in admitting the Garmons' testimony.

Defendant next argues the trial court abused its discretion in denying defendant's motion to withdraw his guilty plea to the habitual offender information, which defendant claims was not timely filed. Defendant has waived this issue on appeal because he did not reserve the right to appeal this issue when he pleaded guilty. *People v Lannom*, 441 Mich 490, 494-495; 490 NW2d 396 (1992); *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997). In any event, we find the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea because defendant failed to establish a fair and just reason for withdrawal of his plea. *People v Kennebrew*, 220 Mich App 601, 605; 560 NW2d 354 (1996). Defendant conceded below that the original information listed the previous felonies upon which his conviction of being an habitual offender was based, which fulfilled the purpose of providing defendant with notice. See *Lannom*, *supra* at 494-495.

In his supplemental briefs, defendant claims he was convicted under a felony information document "only after the rules of procedure were violated" because 1) he was not present during the amendment of the information, 2) there is a fatal variance between the amendment and the magistrate's bindover, and 3) the trial court lacked jurisdiction. Defendant bases his contentions on the fact that the information was amended following dismissal of the felonious assault charges against defendant. The amended information listed the street address of the offense as "22 Brown Street, Grand Rapids," which had previously been listed as "Madison and Franklin, Grand Rapids." Defendant did not raise

this issue below, and his comments at sentencing are not sufficient to preserve this issue. Accordingly, reversal on this basis is inappropriate absent manifest injustice. MCL 767.76; MSA 28.1016; *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984). Manifest injustice is not present here. We disagree with defendant's argument that the change of address on the amended information amounted to an addition of a new offense. Defendant's right to receive a preliminary examination was not violated, *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1994); *People v Price*, 126 Mich App 647, 651-654; 337 NW2d 614 (1983), and the trial court did not lack jurisdiction. Moreover, the change of address on the information did not result in unacceptable prejudice to defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant further argues he was denied the effective assistance of counsel. Defendant did not advance this claim before the trial court. A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court, or will be considered by this Court only to the extent that the claimed counsel mistakes are apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant claims several errors resulted in ineffective assistance of counsel. First, regarding defendant's claim that counsel was ineffective for seeking an adjournment of trial, there is no evidence in the record to support this claim. The record contains a stipulation to adjourn trial because further plea negotiations were necessary. The record does not support defendant's claim that the prosecution was not prepared to proceed with trial nor that the adjournment was done in place of defense counsel protecting defendant's rights. Review of this issue is foreclosed because the deficiency is not apparent on the record. In any event, defendant has not overcome the presumption that the adjournment was sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Second, defendant claims that counsel failed to timely file an interlocutory appeal. The record does not support defendant's claim. Counsel began pursuing an interlocutory appeal within days of the denial of the motion to quash, as evidenced by counsel's May 31, 1994, ex parte petition for expenditure of funds for interlocutory appeal. Moreover, counsel in fact filed an application for leave to appeal, which this Court denied September 9, 1994. *People v Walker*, unpublished order of the Court of Appeals, issued 9/9/94 (Docket No. 177605). Nothing in the record supports defendant's apparent contention that this Court's denial of counsel's application was based on its untimeliness.

Defendant also claims counsel was ineffective for allowing him to plead guilty to a supplemental information that the prosecution untimely filed. This claim is without merit because the supplemental information was not untimely. Defendant had sufficient notice of the supplemental charges in the original

information. Thus, defendant has not shown that counsel's performance was deficient, nor that he was prejudiced.

In his pro se supplemental brief, defendant also claims counsel was ineffective for failing to timely move to suppress the Garmons' testimony. Again, defendant's claim is not supported by the record. Counsel made a motion in limine to exclude the testimony. We fail to see how counsel's performance could be considered deficient.

Defendant also contends in his pro se brief that counsel was ineffective for failing to object to certain remarks by the prosecutor that defendant claims amounted to prosecutorial misconduct. Defendant has not established that if counsel had objected to the remarks, there is a reasonable probability that the result of the proceeding would have been different. His claim of ineffective assistance of counsel must fail.

Finally, defendant argues in his pro se brief that his conviction of carrying a concealed weapon in an automobile violated his right against double jeopardy because he had previously been convicted of the misdemeanor offense of fleeing and eluding the police, MCL 257.602a; MSA 9.2302(1). Defendant was not charged with fleeing and eluding or convicted of this offense in this proceeding. Defendant claims in his brief that he was convicted of the offense on April 26, 1994, but he has not attached any judgment of sentence relating to this conviction and has not pointed to any evidence of this conviction in the trial court record. We decline to review defendant's argument. In any event, assuming defendant's conviction for fleeing and eluding arose out of the car chase that occurred before the police apprehended defendant in this case, defendant's argument that he endured multiple prosecutions for the "same offense" is without merit. The intent of the Legislature determines whether statutes involve the "same offense" under the Double Jeopardy Clause of the federal and state constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). Clearly, the Legislature intended to authorize conviction under both statutes involved in this case.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins